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FILED
FEB 28 1905
JAMES H. McKENNEY,
Clerk.

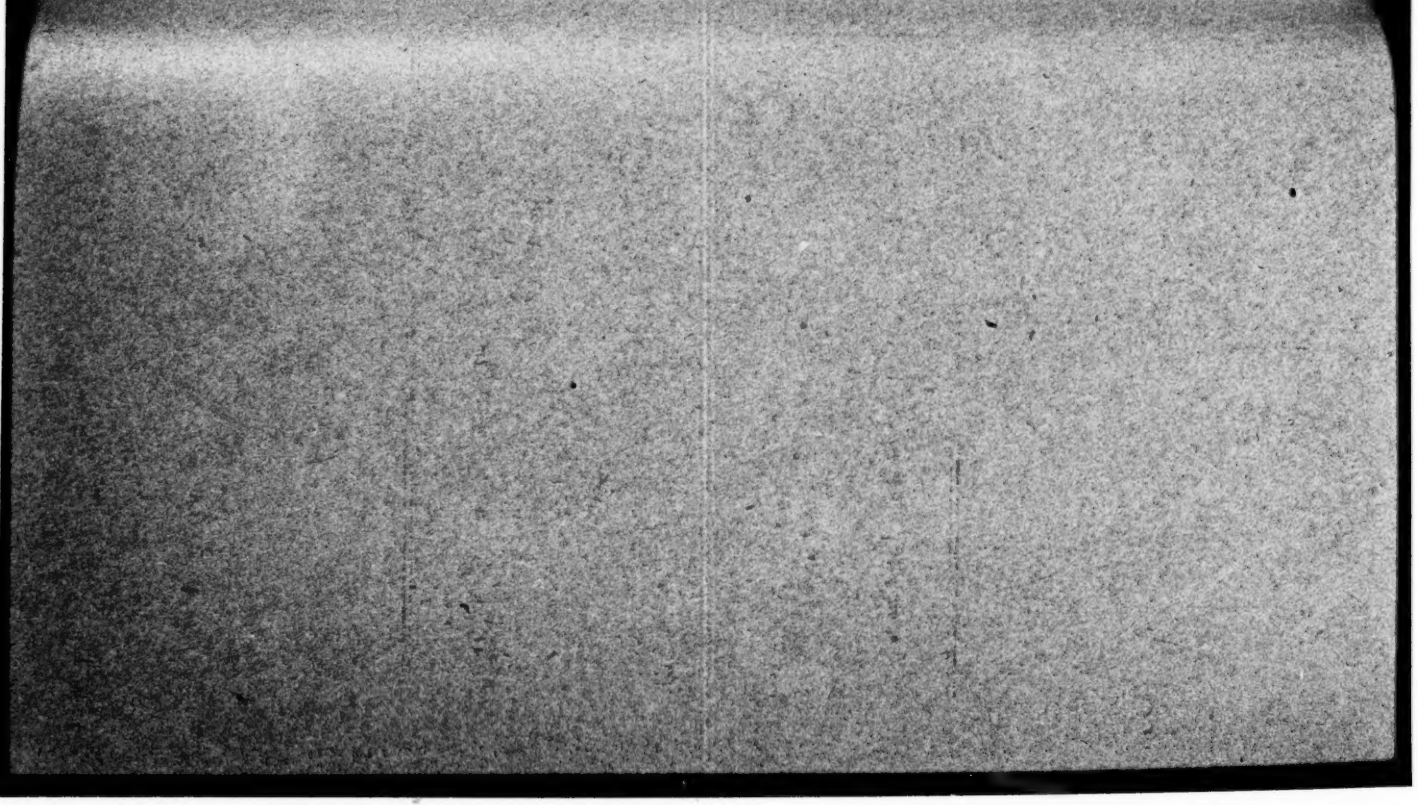
# In the Supreme Court of the United States.

OCTOBER TERM, 1904.

H. HACKFELD & CO., LIMITED, PETITIONER,
*v.*
THE UNITED STATES.
No. 164.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES.



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### STATEMENT.

This is a writ of certiorari to the circuit court of appeals for the ninth circuit to review the decision of that court affirming a judgment of conviction in the district court of the United States for the district of Hawaii against petitioner, H. Hackfeld & Co., Limited, upon an information filed in that court alleging a violation of the provisions of section 10 of the act of Congress of March 3, 1891, entitled "An act in amendment of the various acts relative to immigration and the importation of aliens under contract or agreement to perform labor." (26 Stat., 1084.)

20719—05——1

Said section reads as follows:

> SEC. 10. That all aliens who may unlawfully come into the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came; and if any master, agent, consignee, or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master, agent, consignee, or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine of not less than three hundred dollars for each and every offense; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid.

The United States attorney for the district and Territory of Hawaii entered into a stipulation as to the facts with H. Hackfeld & Co., Limited, as follows (Rec., p. 14):

> The United States of America, the plaintiff in the above-entitled action, through and by Robert W. Breckons, attorney of the United States in and for the district and Territory of Hawaii, and H. Hackfeld & Co., Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, through and by its counsel, Messrs. Kinney,

Ballou, and McClanahan, do hereby agree and stipulate that on the trial of this cause the following shall be taken as the facts, and all the facts, in said cause, and that the jury herein, under the instructions of the court, or the court herein, should the trial by jury be waived, shall determine the cause upon the facts, and none other.

First. That the defendant herein, H. Hackfeld & Co, Limited, is a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii.

Second. That on the 12th day of November, A. D. 1902, within the district and Territory of Hawaii, the said defendant was the agent of the steamship *Korea*, a vessel plying between the State of California and the Empire of Japan.

Third. That on the 28th day of October, A. D. 1902, the said steamship *Korea* did bring into the port of San Francisco, in the United States, one Terujiro Yamoto and one Hachiero Irie, two Japanese persons from Yokohoma, in the Empire of Japan.

Fourth. That on the 29th day of October, A. D. 1902, the said Terujiro Yamoto and the said Hachiero Irie were denied admission into the United States by the board of special inquiry, at the port of San Francisco, in the State of California.

Fifth. That the board so denying admission to the said Terujiro Yamoto and the said Hachiero Irie was regularly constituted, and had jurisdiction to hear and determine the right of the said Terujiro Yamoto and the said Hachiero Irie to land in the United States.

Sixth. That on the said 29th day of October, A. D. 1902, the said board did order the deportation of said Japanese immigrants.

Seventh. That on the 7th day of November, A. D. 1902, said Japanese immigrants were taken from the port of San Francisco to the steamship *Korea* and were received on board of said steamship for the purpose of deporting them to Japan.

Eighth. That on the 12th day of November, A. D. 1902, the said steamship *Korea* did arrive at the port of Honolulu, in the district and Territory of Hawaii; that at the time of the arrival of said steamship *Korea* at said port of Honolulu, the said immigrants were still on board of said vessel; that said Japanese immigrants, together with certain deported Chinese, were placed in a room on board said vessel and locked up by the steerage steward of said vessel; at 12 o'clock midnight of said 12th day of November, A. D. 1902, said Japanese were still on board said vessel in said room; that between that time and 5 o'clock on the morning of the 13th day of November, A. D. 1902, said Japanese had effected their escape; that the only method of egress was through portholes, which were nearly 25 feet above the water; that this method of escape could not have been reasonably anticipated by the master, or officers, or agents of said steamship *Korea*; that said escape did not occur by *vis major* or inevitable accident; and that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant.

> Ninth. That the said defendant made search for said escaped immigrants, but up to the present time have not apprehended the said immigrants, and said immigrants have not been returned to Japan.

A jury was waived, and upon the facts set forth in the stipulation the court found "that said defendant, H. Hackfeld & Co., Limited, a corporation organized and existing under and by virtue of the laws of the Territory of Hawaii, did, on the 12th day of November, A. D. 1902, refuse and neglect to return to the port from whence they came, to wit, to the port of Yokohama, in the Empire of Japan, two certain Japanese immigrants, to wit, Terujiro Yamoto and Hachiero Irie, then and there unlawfully in the United States of America." (Rec., p. 16.) The court thereupon adjudged the defendant guilty and imposed a fine of $600. An appeal was taken to the circuit court of appeals for the ninth circuit, and the judgment of the district court was therein affirmed. The argument of the plaintiff in error in the circuit court of appeals was addressed solely to the construction of the statute under which the complaint was brought. The claim was made that notwithstanding the exact manner of the escape was detailed in the stipulation, the conclusion "that said escape did not occur by reason of any negligence or lack of proper care on the part of the officers of the vessel or said defendant," precluded the trial court from making a finding of negligence; and with the element of negligence out of the case that a conviction could not be had under the statute. The

circuit court of appeals held that the trial court was not bound by the conclusion of the eighth stipulation just quoted, "nor was it prevented thereby from placing upon the stipulated facts the construction which in in its judgment they should properly bear," and affirmed the judgment of the trial court without considering whether a conviction could have been had in the absence of evidence of negligence.

The petitioner here claims (1) that the closing recital in the eighth stipulation was an ultimate fact, and that the court was bound thereby; and (2) to sustain a conviction under said section 10 it was necessary to show negligence on the part of the transportation company.

## ARGUMENT.

### I.

**The Recital in the Stipulation that Defendant was not Guilty of Negligence was a Conclusion of Law and not an Ultimate Fact.**

The immigration act of which section 10 is a part, was passed for the protection of the people of the United States, and to correct in a measure the abuses that had grown up under the immigration system. Thousands of paupers, criminals, and diseased persons were being landed in our midst, constituting a danger and menace to the country. Transportation companies were the great beneficiaries under the system, and were largely responsible through their methods of advertising and disregard of the welfare and interests of this country, for such unsatisfactory conditions.

Section 1 of the act mentions in detail the classes of persons who shall be denied admission. Sections 3 and 4 denounce improper advertising by transportation companies, under penalty. Section 6 provides that any person who brings or aids in bringing into the United States by vessel or otherwise, any alien not lawfully entitled to enter, shall be deemed guilty of a misdemeanor, and punished.

It was stipulated that the alien immigrants in this case were brought here by this company, and were properly denied admission. They were then members of one of the excluded classes. It is further stipulated that these immigrants were taken on board defendant's vessel to be deported. The defendant was then performing a duty imposed by section 10, namely, returning "to the port from which they came," immigrants whom the company should not have brought here. The eighth stipulation goes on to say that "on the 12th day of November, A. D. 1902, the said steamship *Korea* did arrive at the port of Honolulu, in the district and Territory of Hawaii; that at the time of the arrival of said steamship *Korea* at said port of Honolulu, the said immigrants were still on board said vessel; that said Japanese immigrants, together with certain deported Chinese, were placed in a room on board said vessel and locked up by the steerage steward of said vessel; at 12 o'clock midnight, of said 12th day of November, A. D. 1902, said Japanese were still on board said vessel in said room; that between that time and 5 o'clock on the morning of the 13th day of

November, A. D. 1902, said Japanese had effected their escape; that the only method of egress was through portholes, which were nearly 25 feet above the water; * * *"

All the circumstances surrounding the escape are here detailed. If it was the design and purpose of the stipulation to preclude a finding of fact by the court, why were these circumstances set out, and why did the stipulation contain more than a mere allegation that the escape occurred without the fault or negligence of the defendant? This company had brought to our shores immigrants who were not entitled to admission, and who were properly and legally ordered deported on the vessel bringing them here, and upon the vessel coming to anchor "at said port of Honolulu" a short distance only from the shore, locked these immigrants in a room and left them for five hours without guard, when there were portholes large enough to furnish a means of escape, and through which they probably did escape, unless they were able to unlock the unguarded door. If these facts do not constitute negligence on the part of the transportation company, then it is difficult to conceive of a state of facts which would constitute negligence.

Moreover, the rule is frequently stated "that where the facts are undisputed, admitted, or conclusively proved, negligence is a question of law for the court." (21 A. & E. Enc. Law, 506; *Grand Trunk Ry. Co.* v. *Ives*, 144 U. S., 408; *Elliott* v. *Chicago, Mil. & St. Paul Ry. Co.*, 150 U. S., 245; *Union Pac. Ry. Co.*, v. *McDonald*, 152 U. S., 262; and *So. Pac. Co.* v. *Pool*, 160 U. S., 438.)

But the petitioner contends that the court should have entirely ignored the admitted facts in the case, accepted a construction clearly inconsistent therewith, and thus permitted a usurpation of its functions.

## II.

**Assuming the Recital in the Stipulation that Defendant was not Guilty of Negligence as an Ultimate Fact, such a Stipulation would have been Void as against Public Policy.**

The alien immigrants in this case, according to the stipulation, were properly denied admission and properly ordered deported. Under said section 10 of the law of 1891, it was the legal duty of the transportation company to receive back on board such aliens, and to return them to the port from which they came. The transportation company was then the official custodian of these alien prisoners, and as such was charged with more than ordinary responsibility with respect to preventing their escape. It is well settled at common law that an officer who keeps a prisoner so negligently that he escapes is answerable for his neglect as a crime. (Bishop on Cr. Law, vol. 1, edition 1865, sec. 392.)

"An escape implies the negligence or connivance of the officer. And so strongly does the law incline to presume negligence in the officer where an escape occurs, that, though such prisoner should break jail, yet it seems that it will be deemed a negligent escape in the jailer, because it will be attributed to a want of due vigilance in the jailer or his officers." (Bishop Cr. Law, vol. 2, edition 1865, sec. 1056.)

"A negligent escape is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued and taken again before he has been lost sight of. And, from the instances of this offense mentioned in the books, it seems that where a party so escapes, the law will presume negligence in the officer." (Russell on Crimes, 8th Amer. ed., vol. 1, 420.)

The rule is thus stated in *Smith* v. *The Commonwealth* (59 Pa. St., 325):

> The rule in civil cases is—and in criminal it is certainly not less strict—that it is the sheriff's duty to keep every prisoner taken by him by virtue of a writ of execution in *salva et arcta custodia*, for if the sheriff allow a defendant arrested by him on a ca. sa. to go at large for the shortest time, either before or after the return-day of the writ, without consent of the plaintiff, it is an escape, for which the sheriff is answerable.

The transportation company having been the custodian of these alien immigrant prisoners, and having permitted them to escape, negligence was to be presumed. The court was clearly right upon the admitted facts in ruling that defendant was guilty of negligence.

*San Francisco Lumber Company* v. *D. H. Bibb et al.* (139 Cal., 325–326):

> When a particular legal conclusion follows from a given state of facts, no stipulation of counsel can prevent the court from so declaring it.

*Berkshire* v. *The Missouri Pacific Railway Company* (28 Mo. Ap., 225–228):

> It is stated in the agreed statement of facts that the act of 1879 was in force in Cass County at the time mentioned, viz, August 12, 1883. This statement is not the statement of a mere fact, but is also in a certain sense the statement of a conclusion of law. We shall treat the statement as to the fact as conclusive upon us, but surely the statement as to the conclusion of law should not bind us if contradicted and refuted by the public laws of the State. For instance, if the act of 1879 was at the date stated no longer in force in this State by reason of having been repealed by an act of the legislature of the State in 1883, should we treat the act of 1879 as in force because the parties to this case have so agreed and stipulated? The question answers itself.

*Graves* v. *Alsap* (1 Ariz., 274–282):

> We hold that parties to an action can not properly stipulate what the law is that is to govern their case, that courts should not regard such stipulations when made, and we are equally of the opinion that they can not stipulate what the action of a law-making body was in a given case, and from the stipulations thus made ask the court to determine whether a general law is or is not in force.
>
> The agreement of parties that a statute with certain provisions is in force does not make it in force. * * * In deciding the issue raised * * * we shall not regard the stipulation.

*Detroit* v. *Beckman* (34 Mich., 125):

> On the brief for the defendant in error it is stated that "no question is made as to the liability of the city of Detroit for the injury set out in the declaration. The only questions arise upon charges and refusals to charge as to what constitutes negligence," etc. We do not find this distinctly admitted on the part of the city, and if it were, the admission of a rule of law could not obligate the court to accept and act upon it.

*Murphy* v. *People* (3 Colo., 147):

> The costs in criminal cases must be taxed according to law, and not by agreement. Such an agreement is without any consideration, unless the consideration may be mitigation of sentence; and such a consideration between court and convict, or between the prosecuting officer and the convict, would manifestly be void, being against public policy as substituting the bargain with the convict instead of the judgment of the court as the measure of punishment to be inflicted.

To the same effect are *Attorney-General* v. *Rice*, 64 Mich., 385; *Jones* v. *Madison County*, 72 Miss., 777; *Holmes* v. *Johnston*, 59 Tenn., 155; and *Happel* v. *Brethauer*, 70 Ill., 166.

The admission of specific facts nullifies a reservation denying their legal effect. (20 Enc. Pl. and Prac., 661; *Haight* v. *Green*, 19 Cal., 113.)

Surely it would have been against public policy for the court, upon whom the ultimate responsibility rested

of weighing these stipulations and determining whether a law of the United States had been violated, to have permitted parties to bind the court by a conclusion absolutely inconsistent with the facts, and thereby not only escaped the consequences of a violation of the law, but established a precedent which would have enabled others to do the same.

## III.

**The Defendant was Properly Adjudged Guilty by the Trial Court even if we Assume that there was no Evidence before the Court upon which a Finding of Negligence Could be Based.**

Section 10 under which the prosecution in this case was commenced formed a part of the immigration act of 1891, as previously pointed out. The Executive Department charged with its enforcement took the position immediately upon its passage, that the spirit and language of the act demanded that transportation companies bringing to our shores immigrants whose admission the law prohibited were chargeable at all hazards with the responsibility for the return of those immigrants to the ports from which they came.

In 1893 the circuit court of appeals for the first circuit, in the case of *Warren* v. *United States* (58 Fed. Rep., 559), sustained the interpretation thus placed upon section 10 by the Treasury Department. One Frederick Warren was prosecuted in the district court for the district of Massachusetts for neglecting to detain on board his vessel immigrants who had been ordered deported. At the trial evidence was offered

that the escape of the immigrants occurred without any negligence on the part of the defendant. The evidence was excluded as immaterial, and the defendant convicted. The circuit court of appeals carefully reviewed the whole act and ruled that the agent of a vessel who is ordered to detain on board and return immigrants unlawfully brought to this country is bound to do so at all hazards, and will only be relieved by *vis major* or inevitable accident.

The court said (p. 562):

> We can not doubt, after thus examining the statute, that the tenth section imposes on masters, owners, agents, and consignees absolutely the duty to do the things required of them respectively. It admits of no excuse. They must at their peril conform to the provisions of the statute. They took the risk, when they brought the alien from a foreign port, that he would be adjudged not lawfully suitable to be admitted here, and must be taken back. The statute is analogous to acts regarding the sale of unwholesome or diseased provisions, or the keeping and storage of dangerous explosives, or the sale of intoxicating spirits. The safety and protection of the public is the end sought. Upon everyone rests the duty to see to it that no act or omission of his shall endanger that safety and if he fails of the full performance of that duty, good intention, or the absence of evil intention, will not excuse him. The responsibility may be regarded similar to that resting upon a sheriff in case of an escape. He

> can not excuse himself by showing that he had exercised care to keep his prisoner. Notwithstanding this view of the aims and purpose of the statute, if it can not without violence be construed so as to effect its intention, it will be found a case where the legislature, by inadequate or inconsistent expression, has fallen short of its design. And in support of the contention that this is such a case, stress is laid on the expression "neglect to detain;" but we have no doubt that, in view of the general purposes of the statute, the word "neglect" must here receive a common and popular signification, as the equivalent of "fail" or "omit." The employment of the term "neglect" in this sense is neither infrequent nor unfamiliar, and assigning to it here any more restricted or narrow definition would defeat the whole end of the statute, a result to be tolerated only when necessary. It follows, therefore, that the rulings of the court below were correct and the judgment must be affirmed.

This construction of the law has been followed by the administrative officers down to the present time.

In 1895 a prosecution was commenced in the district court for the eastern district of Pennsylvania, under the eighth section of the law, charging the defendant "with knowingly and negligently landing or permitting to land certain alien immigrants at the port of Philadelphia on the 14th day of July, 1895, contrary to the form of the act of Congress in such case made and provided." (*United States* v. *Spruth*, 71 Fed.

Rep., 678.) The material part of section 8 reads as follows:

> * * * It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall either knowingly or negligently land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeaner and punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment

In view of the language of section 8, the court ruled that to justify a conviction under that section it was necessary to prove willful or negligent permission to escape. It is true, as pointed out in petitioner's brief, that the court took occasion to refer to the decision in the Warren case, which was, as we have seen, founded upon a different section of the law; but this reference was gratuitous, and clearly dicta.

In 1903 Congress found it necessary to carefully revise the immigration laws, which resulted in the act of March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States." (32 Stat., 1213.)

The part of section 8 of the act of March 3, 1891, previously quoted, became section 18 of the act of March 3, 1903. It is significant in view of the de-

cision of the district court for the eastern district of Pennsylvania above referred to, that the words "either knowingly or negligently" were omitted in the revised act. This clearly indicates that Congress intended to charge transportation companies with the responsibility of preventing, at all hazards, the landing of aliens into the United States at any other time or place than that designated by the immigration officers.

Section 10 of said act of 1891, having received a judicial construction in 1893 in accordance with the evident scope and purpose of the act, and having been executed in accordance with that construction, was reenacted as section 19 of the act of 1903. This we contend is conclusive on the question of the intent of Congress. It is perfectly apparent that Congress had in mind each of the decisions referred to; and it will be remembered that the court in the Spruth case took occasion to criticise the decision in the Warren case. Congress, with full knowledge of this, omitted in the revised act the words which were responsible for the adverse decision in the Spruth case, and *reenacted* section 10, which had received a construction in harmony with the intent of Congress and the spirit of the act. The act of 1903 was therefore a direct legislative affirmance of the construction theretofore given to section 10 of the act of 1891. (See *Vanderbilt* v. *Eidman*, decided February 20, 1905.)

An analysis of sections 20 and 21 of the revised act of 1903 discloses additional reasons for the view

taken that Congress used neglect in this act in the sense of omit. These sections are as follows:

> SEC. 20. That any alien who shall come into the United States in violation of law, or who shall be found a public charge therein, from causes existing prior to landing, shall be deported as hereinafter provided to the country whence he came, at any time within two years after arrival, at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing such alien into the United States, or, if that can not be done, then at the expense of the immigrant fund referred to in section one of this act
>
> SEC. 21. That in case the Secretary of the Treasury shall be satisfied that an alien has been found in the United States in violation of this act he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came, as provided in section twenty of this act, or, if that can not be so done, at the expense of the immigrant fund provided for in section one of this act; and neglect or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of the Treasury to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this section shall be punished by the imposition of the penalties prescribed in section nineteen of this act.

It will be noticed that under section 21, "neglect or refusal * * * to take on board, guard safely, and return to the country whence he came, any alien ordered to be deported under the provisions of this section shall be punished by the imposition of the penalties prescribed in section nineteen of this act."

It is well settled that "the object of all interpretation and construction of statutes is to ascertain and carry out the intention of the lawmakers, and when the intention is ascertained it must always govern." (26 A. and E. Enc. Law, 597.)

The fact that this law was enacted in 1891, immediately construed by the Treasury Department, and that construction adopted and approved by the circuit court of appeals for the first circuit, and followed down to the time of the revision by Congress in 1903 of the immigration laws, when the section was reenacted in that revision, must be held to be an adoption by Congress of that construction.

> The contemporaneous and long-continued practice of officers required to execute or take special cognizance of a statute is strong evidence of its true meaning, and should not be disregarded except for cogent reasons. (26 A. & E. Enc. Law, 635; *Stuart* v. *Laird*, 1 Cranch, 299; *Edwards* v. *Darby*, 12 Wheat., 206; *United States* v. *State Bank*, 6 Pet., 29; *Cooley* v. *Board of Wardens*, 12 How., 299; *Union Ins. Co.* v. *Hoge*, 21 How., 35; *Havemeyer* v. *Iowa County*, 3 Wall., 294; *United States* v. *Gilmore*, 8 Wall., 330.)

In *United States* v. *Moore* (95 U. S., 760–763), the court, through Mr. Justice Swayne, said:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. (*Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *The State Bank of North Carolina*, 6 Pet., 29; *United States* v. *McDaniel*, 7 id., 1.) The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.

In the case of *United States* v. *Johnston* (124 U. S., 236–253) Mr. Justice Harlan, speaking for the court, said:

> In view of the foregoing facts the case comes fairly within the rule, often announced by this court, that the contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous.

In the case of *Pennoyer* v. *McConnaughy* (140 U. S., 1–23) the court said:

> The principle that the contemporaneous construction of a statute by the executive officers of the Government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our juris-

prudence that no authorities need be cited to support it.

To the same effect are *Burrow Giles Lith. Co.* v. *Sarony*, 11 U. S., 53; *Brown* v. *United States*, 113 U. S., 568; *The Laura*, 114 U. S., 411; *United States* v. *Philbrick*, 120 U. S., 52; *United States* v. *Hill*, 120 U. S., 169; *Schell* v. *Fauche*, 138 U. S., 572; *Heath* v. *Wallace*, 138 U. S., 573; *United States* v. *Alabama G. S. R. Co.*, 142 U. S., 615; *Swift's case*, 14 C. Cls. R., 208.

While it is true that penal statutes should be construed strictly, it is equally true that they will be construed so as to give effect to the legislative intent, and where that intent is clear, courts will not construe a statute with such technicality as to defeat its purpose.

In the case of *United States* v. *Hartwell* (6 Wall., 385–397), the defendant, a clerk in the office of the assistant treasurer of the United States at Boston, loaned a large amount of money, with the safe-keeping of which he was intrusted. He was indicted for embezzlement under the sixteenth section of the act of August 6, 1846, which provides in part that "if any of the said officers shall loan any portion of the public moneys * * * every such act shall be deemed an embezzlement." It was contended that the defendant was merely a clerk, and that the section drawn in question applied to "principal officers" only. The court said:

> We are not unmindful that penal laws are to be construed strictly. It is said that this rule is almost as old as construction itself. But whenever invoked it comes attended with qualifications and other rules no less important. It

is by the light which each contributes that the judgment of the court is to be made up. The object in construing penal, as well as other statutes, is to ascertain the legislative intent. That constitutes the law. If the language be clear, it is conclusive. There can be no construction where there is nothing to construe. The words must not be narrowed to the exclusion of what the legislature intended to embrace; but that intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject. It must not be defeated by a forced and overstrict construction. The rule does not exclude the application of common sense to the terms made use of in the act in order to avoid an absurdity which the legislature ought not to be presumed to have intended. When the words are general and include various classes of persons, there is no authority which would justify a court in restricting them to one class and excluding others, where the purpose of the statute is alike applicable to all. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the narrow technical one; but the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent (pp. 395–396).

In the recent case of *Hawaii* v. *Mankichi* (190 U. S., 197) it was said:

> If the words of the Newlands resolution, adopting the municipal legislation of Hawaii *not contrary to the Constitution of the United States*, be literally applied, the petitioner is entitled to his discharge, since that instrument expressly requires, amendment 5, that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and, amendment 6, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." But, there is another question underlying this and all other rules for the interpretation of statutes, and that is, What was the intention of the legislative body?

There is analogy between the case under consideration and that of *Johnson* v. *Southern Pacific Company*, decided by this court December 19, 1904, in which Mr. Chief Justice Fuller, speaking for the court, said:

> The primary object of the act was to promote the public welfare by securing the safety of employees and travellers, and it was in that aspect remedial, while for violations a penalty of one hundred dollars, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the

revenue, and for the collection of customs, that rule not requiring absolute strictness of construction. *Taylor* v. *United States*, 3 How., 197; *United States* v. *Stowell*, 133 U. S., 1, 12, and cases cited. And see *Farmers' National Bank* v. *Deering*, 91 U. S., 29, 35; *Gray* v. *Bennett*, 3 Met. (Mass.), 539.

Moreover, it is settled that "though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature." (*United States* v. *Lacher*, 134 U. S., 624.)

The following cases may also be cited:

*United States* v. *Lacher*, 134 U. S., 624; *Bolles* v. *Outing Co.*, 175 U. S., 262; *O'Grady* v. *Wiseman*, 9 Quebec Q. B. 169, 3 Can. Crim. Cas., 332; *Indianapolis* v. *Huegele*, 115 Ind., 581; *State* v. *McCrystol*, 43 La. Ann., 907; *State* v. *Glaudi*, 43 La. Ann., 914; *State* v. *Archer*, 73 Md., 44; *Stricker* v. *Pennsylvania R. Co.*, 60 N. J. L., 230; *State* v. *Godfrey*, 97 N. Car., 507; *Hardwick* v. *Vt. Tel., etc., Co.*, 70 Vt., 180.

In support of the proposition that "when an act or part thereof which has received a judicial interpretation is reenacted in the same terms, or where words used in a statute have a definite and well-known meaning in law, that construction or that meaning must be considered to have the sanction of the legislature unless the contrary appears," see 26 A. & E. Enc. Law, 650; *United States* v. *Central Pac. R. Co.*, 118 U. S., 235; *United States* v. *Le Bris*, 121 U. S., 278.

In the case of *United States* v. *Mooney* (116 U. S., 104–106), the court said:

> It is not to be supposed that Congress, in using in the act of 1875 the same language, so far as the present question is concerned, as that employed in the act of 1789, intended to give it a meaning different from that put upon it by this court, and which had remained unchallenged for three-quarters of a century.

In the case of *The Devonshire* (13 Fed. Rep., 39), which was an admiralty case, a suit was brought to enforce a lien against the British steamship *Devonshire* for penalties alleged to have been incurred by the master and owners by a violation of section 2 of the act of March 3, 1855 (10 Stat., 1017; sec. 4255, R. S.), entitled "An act to regulate the carriage of passengers in steamships and other vessels." The suit was defended on the ground that the vessel in question was a steamship and that the passengers thereon were steerage passengers, and therefore section 4255 of the Revised Statutes was not applicable. It appeared that the statute in question was before the district court for the southern district of New York in 1868, and that it was then ruled that the section was not applicable to steamships. The law was reenacted in 1877 in the language of the original act.

The court said (p. 42):

> But in the light of the decision in the case of *The Manhattan*, and particularly the unqualified reenactment by Congress of section 10 in

1877, after the construction there given to it in 1868, I do not feel at liberty to hold otherwise.

In the case of *Inhabitants of Rutland* v. *Inhabitants of Mendon* (18 Mass., 154), it was ruled that if a provision in one statute which has received a judicial construction be inserted in another the same construction will be given it. Numerous State and Federal cases are cited to support this proposition in the American Digest, vol. 44, col. 2865.

Moreover, if we consider section 10 without reference to the fact that it has received a construction by an executive department which has been sustained by judicial decision and adopted by Congress, we must reach the same conclusion, namely, that alien immigrants improperly brought to our shores, and who are denied admission and ordered deported, must be kept safely by the person responsible for their coming, and chargeable under the law with their return; and if he suffers them to escape, such person has neglected to return them within the meaning of this section.

We contend that the word "neglect" is used here in its ordinary sense, and means to omit. The section provides for, if practicable, the immediate return of an alien on the same vessel; for payment of costs of maintenance while on land and expenses of return by the owner of such vessel; for refusal or neglect by the master, agent, consignee, or owner to return an alien to the port from which he came, and for refusal or neglect to pay the cost of maintenance on land.

"Neglect," says Bouvier (vol. 2, 478), "means to

omit, as to neglect business, or payment, or duty, or work. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty, or act."

In the case of *Rosenplaenter* v. *Roessle* (54 N. Y., 262–267), where chapter 421 of the laws of 1855, which provides that when the proprietor of any hotel furnishes a safe for money, jewels, or ornaments of guests, and posts a notice stating the fact in the rooms, if the guests shall neglect to deposit in such safe, the proprietor will not be liable for loss, was construed, the court said:

> * * * But in every case where the guest has an opportunity to make the deposit and does not make it, he neglects to make it within the meaning of the statute. To neglect means to omit, as to neglect business, or payment, or duty, or work, and is generally used in this sense. It does not generally imply carelessness or imprudence, but simply an omission to do or perform some work, duty, or act. It is manifestly in this sense that it is used in this statute. To hold that the guest must be guilty of some actual negligence in not making the deposit would be substantially to nullify the statute.

In *Merrifield* v. *Cobleigh* (4 Cush. Mass., 178–185) Chief Justice Shaw said:

> * * * The condition in the present case is that the estate shall be void if the grantee, her heirs or assigns, shall "neglect" or "refuse" to support the fence.

> Both these terms, in connection with the subject-matter, imply some previous demand, notice, or request, if the fence has decayed or been removed, to replace it, and that the defendant had either "refused" in terms to do the act required or "neglected;" that is, after notice or request, and after a reasonable time allowed for that purpose, had failed to do it. In the present case, it appears that no such demand or request was made or notice given. There was, therefore, no breach of condition, which defeated the estate at the time of the entry of the demandant, and this action can not be maintained.

The case of the *Atchison, Topeka and Santa Fe Railroad Company* v. *Louis Billings* (7 Kans. App. Rep., 399) is an answer to the contention of petitioner that the word neglect does not mean omit. In that case section 1259 of the General Statutes of 1899 of Kansas imposed a duty upon a railroad company to build cattle guards where necessary, whenever its line of railroad passed through a fenced field. The statute provided that for failure to build such cattle guards the injured party might recover all damages he had sustained by reason of such failure, and that it should only be necessary to prove "neglect or refusal on the part of the company to construct such cattle guards." The court ruled that neglect, as used in the law, implied knowledge, but not necessarily notice of any particular kind; that if knowledge was brought to the company, neglect was sufficiently proved. It will thus be seen that the

words neglect and refuse frequently imply omission after notice.

See also *Willoughby* v. *Willoughby*, 9 Q. B., 923; *Leslie* v. *Lorillard*, 31 Hun, N. Y., 305; and *Daniels* v. *Ellison et al.*, 3 N. H., 279.

A ruling placing upon the Government the burden of proving actual negligence on the part of transportation companies responsible for the escape of alien immigrants ordered deported would in effect render it practically impossible to obtain a conviction for a violation of said section 10, for the reason that the only information the Government would have or be able to obtain would be the bare fact of the escape. Obviously such a result would defeat the purpose of the statute, and all the provisions for sifting out and sending back undesirable immigrants would amount to nothing. Surely had Congress contemplated any such result, provision would have been made for the deportation of these immigrants by immigration officials at the expense of transportation companies. However earnestly petitioner may contend that this law should not be construed so as to charge transportation companies at all hazards with the responsibility of returning undesirable immigrants, it is undoubtedly true that petitioner would much prefer occasionally to pay a small fine under such an interpretation of the law than to pay the cost of deportation by the Government of *all* undesirable immigrants.

And since the evil aimed at in this statute, as the court remarked in the Warren case (*supra*), "was the

absolute exclusion from this country of all immigrants of the classes named in the act," we respectfully submit that the decision of the circuit court of appeals should be affirmed.

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